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IN THE

Supreme Court of the United States

October Term, 1957.

No. 538

AURELIO CANO and CHARLES MARTIN,
Appellants,

v.

COMMONWEALTH OF PENNSYLVANIA,
Appellee.

On Appeal From the Supreme Court of Pennsylvania.

JURISDICTIONAL STATEMENT.

WILLIAM T. COLEMAN, JR.,
LOUIS G. HILL,
PHILIP P. KALODNER,
DILWORTH, PAXSON, KALISH & GREEN,
2635 Fidelity-Philadelphia Trust Building,
Philadelphia 9, Pennsylvania,
Attorneys for Appellants.

CURRAN & LAVELLE,
310 West Market Street,
Pottsville, Pennsylvania,
ALVIN E. MAURER, JR.,
124 West Market Street,
Pottsville, Pennsylvania,
Of Counsel.

October 8, 1957.

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AURELIO CANO and CHARLES MARTIN,
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COMMONWEALTH OF PENNSYLVANIA,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

JURISDICTIONAL STATEMENT.

OPINIONS DELIVERED IN THE COURTS BELOW.

The opinion of the Supreme Court of Pennsylvania is reported at 389 Pa. 639 (1957) (Appendix A, *infra*, p. 36a). The opinion of the Superior Court of Pennsylvania is reported at 182 Pa. Super. Ct. 524, 128 A. 2d 358 (1956) (Appendix A, *infra*, p. 12a). The opinion of the trial court is not reported (Appendix A, *infra* p. 1a). The order of the Supreme Court of Pennsylvania denying rehearing on the federal constitutional issues, one Justice dissenting, is printed at Appendix A, *infra*, p. 46a.

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION IS INVOKED.

This appeal involves the constitutionality under the Fourteenth Amendment of the criminal section of the Pennsylvania Anthracite Coal Mine Law, Act of June 2, 1891, P. L. 176, Art. XVII § 1, 52 PURD. STAT. ANN. § 511. The constitutional questions arise because of the interpretation placed upon that section by the courts of Pennsylvania. The relevant section provides in part:

> "Any judge of the court of quarter sessions of the peace of the county in which the mine or colliery, at which the offense, act or omission as hereinafter stated has occurred, is situated, is hereby authorized and required, upon the presentation to him of the affidavit of any citizen of the Commonwealth setting forth that the *owner, operator* or superintendent or any other person employed in or about such mine or colliery, *had been negligently guilty of an offense against the provisions of this act*, whereby a dangerous accident had resulted or might have resulted to any person or persons employed in such mine or colliery, to issue a warrant to the sheriff of said county, directing him to cause such person or persons to be arrested and brought before said judge, who shall hear and determine the guilt or innocence of the person or persons so charged; and, if convicted, he or they shall be sentenced to . . . imprisonment in the county jail for a period not exceeding three (3) months. . . ." (Italics supplied.)

The issues of constitutionality arise because the Superior Court of Pennsylvania interpreted this Section as authorizing imprisonment of Appellants for alleged technical violations of mine safety regulations by their employees despite the fact that (1) Appellant Cano was several

thousand miles away at the time of the occurrence of the alleged violations; (2) Appellant Martin had never been in the mine in question, being responsible solely for the financial and bookkeeping end of the operation; and (3) neither Appellant had knowledge of the alleged violations, had directed or authorized them or had been negligent with respect to their commission.

This interpretation raises the substantial constitutional question of the extent to which a doctrine of vicarious criminal liability can be used to impose jail sentences as a result of a mere employer-employee relationship, consistent with the due process requirements of the Fourteenth Amendment.

It also raises the substantial constitutional issue whether the statute is unconstitutionally vague, and the convictions void, inasmuch as no person could possibly know, by reading the statute, which expressly requires that the *defendant operator* be "negligently guilty," that it would be interpreted so as to subject him to imprisonment without negligence or, indeed, without any act on his own part.[1]

The Supreme Court of Pennsylvania refused to review the foregoing interpretation of the statute by the Superior Court, but limited its review, sought by a petition for allowance of appeal, to a totally separate question of State law (Appendix A, *infra*. p. 35a). Following the decision of the Supreme Court of Pennsylvania affirming the convictions on this State law ground, appellants requested reconsideration of the limitation of the allowance of the appeal and reargument before the Supreme Court of Pennsylvania on the constitutional issues first inserted in the case by the interpretation given the statute by the Superior Court of Pennsylvania. This petition was denied by the court below on September 5, 1957, one Justice dis-

1. There are at least 100 separate technical requirements in the Act, and the Pennsylvania courts held that a defendant was subject to a separate three month sentence for each technical provision violated.

senting (Appendix A, *infra* p. 46a). Notice of appeal to this Court was filed in the Supreme Court of Pennsylvania on September 17, 1957.

The appeal jurisdiction of this Court is based on 28 U. S. C. § 1257(2), in that the validity of a State statute—the Act of June 2, 1891, P. L. 176—, *supra*—on the ground of its repugnancy to the Constitution of the United States has been drawn into question and the decisions of the Supreme and Superior Courts of Pennsylvania were in favor of its validity. Appeal is the proper procedure to bring such a question before this Court where the statute's constitutionality is challenged because of the state court's interpretation thereof. *Slochower v. Board of Education of New York*, 350 U. S. 551; *Poulos v. New Hampshire*, 345 U. S. 395; *Winters v. New York*, 333 U. S. 507.[2]

In the alternative, pursuant to 28 U. S. C. § 2103 (see *May v. Anderson*, 345 U. S. 528, 530; *Union National Bank v. Lamb*, 337 U. S. 38, 39-40), the certiorari jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3), in that rights, privileges and immunities, due process and equal protection of the law, as guaranteed by the Fourteenth Amendment of the Constitution of the United States have been denied.

STATUTE INVOLVED.

The statute asserted to be invalid as applied is the Act of the Pennsylvania Legislature of June 2, 1891, P. L. 176, the relevant parts of which are printed in Appendix B, *infra*, p. 47a.

The constitutional provision involved is the Fourteenth Amendment to the Constitution of the United States.

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2. The cases cited in the text make it clear that on such appeal the State court interpretation of the statute—rather than the apparent statutory language—is the touchstone of consitutionality. Indeed, in the *Slochower* case, as here, the state court had, in interpreting the statute involved, eliminated an element required by it for its applicability, and had thereby rendered the statute unconstitutional.

QUESTIONS PRESENTED

A State statute authorizes imprisonment for a coal mine "owner, operator . . . or any other person employed" who have been "negligently guilty" of violating the statutory regulatory mine safety provisions. In affirming the conviction of two individual "operators" under the statute, where the violations had been committed without the operators' direction, knowledge, authorization or negligence, by "persons employed" or by independent contractors, the State court eliminated the statutory requirement of defendant's negligence, and held that whenever a criminal violation was committed in a mine by an employee or by independent contractors the employer could be jailed for such violation even though the employer was wholly without fault or negligence.

The questions presented are:

1. Whether a conviction and a year's imprisonment under a criminal statute employing the civil doctrine of respondeat superior to authorize a jail sentence for an employer for the criminal acts of his employees merely by virtue of the employment status, thus imposing absolute vicarious criminal liability without fault, are a deprivation of liberty under the Fourteenth Amendment?

2. Assuming the State has the power to impose a jail sentence for absolute vicarious criminal liability without fault, whether the wholly unanticipated judicial elimination of the statutory requirement that the offending negligence be that of the defendant renders the statute unconstitutionally vague and the convictions void under the Fourteenth Amendment, in that the individuals convicted could not reasonably have known what responsibilties the statute imposed upon them?

STATEMENT OF THE CASE.

This case involves, inter alia, a question never decided by this Court: whether a State can constitutionally impose a prison sentence on an individual employer for a violation of a regulatory criminal statute by an employee or independent contractor, even though the employer had no knowledge of the violation, had not authorized or directed it, nor was negligent in respect to its commission.

Appellants Cano and Martin were the owners and operators of a small coal mine in Forrestville, Schuylkill County, Pennsylvania, under a lease from the owner (N. T. 224).[3] Cano was the superintendent of mine operations (N. T. 222). Martin's function was restricted to the financial side of the enterprise, and, in fact, he had never been in the mine (N. T. 287).

After the death of five miners from a mine cave-in,[4] Appellants were tried, convicted and sentenced to a year in jail under Section 1, Article XVII of the Pennsylvania Act of June 2, 1891, P. L. 176, 52 PURD. STAT. ANN. § 511. That section provides for criminal action against any mine "owner, operator . . . or any other person employed . . . [who have] . . . *been negligently guilty of an offense against the provisions of this Act*, whereby a dangerous accident had resulted or might have resulted to any person or persons employed in or about such mine." (Italics supplied.)

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3. The page references are to the typewritten page numbers of the trial Notes of Testimony, a certified copy of which has been filed with this Court as part of the Record.

4. Although the filing of the information instituting the prosecution immediately followed the fatal accident and in fact testimony as to the gruesome details of that accident pervaded the trial, both the Superior and Supreme Courts of Pennsylvania have recognized that appellants "were not charged in these proceedings with any crime directly related to the deaths." (Supreme Court Opinion, Appendix A, *infra*, p. 37a; Superior Court Opinion, Appendix A, *infra*, p. 13a).

Appellants were convicted in connection with four technical violations: an obligation to drill ahead under certain conditions, an efficient brake requirement, an air measurement report requirement, and a maximum explosive storage requirement (Appendix B, *infra*, pp. 47a-49a), 52 PURD. STAT. ANN. §§ 286, 356, 564, 421.

Each Appellant was sentenced by the trial court on each count to three months in prison and to pay a fine of Five Hundred ($500.) Dollars. The sentences were imposed to run consecutively, constituting a total fine of Two Thousand ($2,000) Dollars, and a prison sentence of one year for each Appellant.

At the time of the commission of the alleged violations of which they were convicted, neither Cano nor Martin was in or near the mine. Cano in fact, was away for his health in Phoenix, Arizona, several thousand miles away and had been for the preceding two weeks (N. T. 226) and Martin had never been in the mine (N. T. 287). The operation of the mine had been assigned to two qualified shift foremen as to whose selection no charge is made that Appellants were negligent. Appellants could not, therefore, have been personally responsible for violations which involved affirmative action on the part of their employees or independent contractors.

A clear example of the injustice wrought by the decision below is the violation with regard to the amount of dynamite stored in the mine. On the date of the inspection, when neither Cano nor Martin was near the mine, an excessive amount of dynamite (300 pounds, rather than the statutorily allowable 150 pounds, which was the amount used in one day (N. T. 244)) was delivered to the mine without the knowledge of the shift leader by "the powder man, Morgans" who was not even an employee of the Appellants (N. T. 211). It was immediately ordered out the same day by the shift leader as soon as it was called to his attention (N. T. 17, 211). There was no show-

ing of any pattern of keeping an excessive amount of dynamite in the mine and there was no evidence that an excessive amount had ever on any other occasion been in the mine. To say that either Cano, who was far away and had been for two weeks, or Martin, who had never been in the mine and who had no operating function with regard to it, was responsible for that isolated violation, involves a concept of responsibility inconceivable to anyone reading the statute.

The Superior Court, faced with this type of evidence as to responsibility, nevertheless upheld the conviction under the evidence by interpreting the statute to mean that a jail sentence could be imposed on a mine operator for any violation occurring in that mine, such responsibility being imposed based on the fact of the employment status alone. The Superior Court found it sufficient for the personal responsibility requirement of the statute that both Cano and Martin "were in charge of the mine and that at the time of the accident, Martin was in charge." (Opinion of the Superior Court, Appendix A, *infra*. p. 29a).

(*How the Federal Questions are Presented*).

The case was tried on the theory that negligence was required and that the negligence would have to be that of the defendants. The appeal to the Superior Court was on the ground that the evidence would not support the charge measured by such requirements. But that court held that personal negligence of the employer was not required. This interpretation rendered the statute unconstitutional. And, therefore, the constitutional issues, being based solely upon the interpretation of the Superior Court, could have been raised only after such decision. *Saunders v. Shaw*, 244 U. S. 317; *Brinkerhoff-Faris Trust & Savings Company v. Hill*, 281 U. S. 673. Although the Supreme Court of Pennsylvania was asked to review the entire Superior Court decision by Appellants' petition for the

allowance of such appeal, that court limited its allowance to a question whether the proceedings were properly commenced by information rather than indictment (Appendix A, *infra*. p. 35a). Following the Supreme Court decision on the limited issue which it consented to hear, Appellants requested that court to reconsider its allowance of appeal and to hear argument on the federal constitutional issues raised by the Superior Court opinion and here set forth. The petition was also filed with the court below as a petition for reargument, being required prior to appeal to this Court by Rule 71 of the Rules of the Supreme Court of Pennsylvania. Cf. *Saunders v. Shaw*, 244 U. S. 317, at p. 320 (wherein the federal question was raised before the State court only in the assignment of errors filed with the state court preliminary to the petition for allowance of an appeal to this Court). After consideration of Appellant's petition, the Supreme Court of Pennsylvania denied the petition, one Justice dissenting.

The constitutional issues, therefore, having first been raised by the Superior Court's opinion, have been urged in the Supreme Court of Pennsylvania which has declined to hear them. These questions have, therefore, been properly raised and are properly before this Court. *Uveges v. Pennsylvania*, 335 U. S. 437 It is clear, furthermore, that the federal issues necessarily being implicit in the case, this Court has jurisdiction to pass on them. *Cf. St. Louis, Iron Mountain & Southern Ry. v. Starbird*, 243 U. S. 592; see BICKEL, THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS, pp. 21-23, 27-33 (1957).

THE APPEAL PRESENTS SUBSTANTIAL FEDERAL QUESTIONS.

1. It cannot be emphasized too strongly that the State courts have here affirmed a jail sentence for men who had no connection with the alleged criminal violations either by way of action or mental state of awareness; but merely

because they stood in a certain employment relationship with the doers of the allegedly unlawful acts.

It is fair to state that no case in this Court has upheld vicarious absolute criminal liability on individuals for the criminal acts of their employees. And the rule that a principal cannot be held criminally responsible for the acts of his agents or independent contractors, in which acts he did not participate directly or indirectly, is long established: *People v. Canadian Fur Trappers Corp.*, 248 N. Y. 159, 161 N. E. 455 (1928); *Commonwealth v. Johnston*, 2 Pa. Super. 317 (1896); *cf. Denver & R. G. Ry. v. Harris*, 122 U. S. 597. For, ". . . it is the very essence of our deep-rooted notions of criminal liability that guilt be personal and individual . . .". Sayre, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 689, 717 (1930).

On this basis alone, therefore, the convictions should be reversed.

It is true that convictions for violating regulatory statutes have been sustained where the doer of the act was not aware that the act voluntarily undertaken by him was criminal because of a factual situation of which he was ignorant, *i. e.* where there was no *mens rea*. *E. g., United States v. Balint*, 258 U. S. 250; *Sherlin-Carpenter Company v. Minnesota*, 218 U. S. 57; *United States v. Greenbaum*, 138 F. 2d 437 (C. A. 3rd, 1943).

But this Court has specifically recognized that whereas the requirement of *mens rea* may be removed, there must be *some* act committed by the defendant before he may be imprisoned. *United States v. Dotterweich*, 320 U. S. 277. In that case, this Court in affirming the conviction of an individual defendant for shipping adulterated drugs in interstate commerce, pointed out that the question of responsibility for violation is a different one from the question whether the one responsible is conscious of the wrongdoing committed. This Court, after noting that

defendant Dotterweich need not have known that the drugs shipped were in fact adulterated, stated (p. 285), "the District Court properly left the question of the responsibility of Dotterweich for the shipment to the jury, and there was sufficient evidence to support its verdict".

This Court, therefore, in the *Dotterweich* case clearly held that regardless of the elimination of the requirement of *mens rea*, there still is a requirement of responsibility for action in order for there to be a criminal conviction. This is a matter of fundamental due process. Because this element is lacking in the instant convictions, they should be reversed.

It is also true that some State courts have affirmed convictions under regulatory statutes in the absence of both a *mens rea* and an act by the defendant where fines were the only penalty. These have usually been cases where a corporation is the defendant and where the imposition of a fine is the only criminal penalty which is possible. The courts have, therefore, not been faced with the problem of deprivation of liberty presented when an individual is the defendant. See Note, 60 HARV. L. REV. 283 (1946). In those cases where an individual has been the defendant, punishment has, for the most part, consisted of a fine, rather than the imposition of a jail sentence, thereby again not presenting the problem of deprivation of liberty. See Sayre, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 689 (1930). The result of this trend has been to create what Professor Sayre has termed an "area of conflict and doubt" as to the question of when vicarious criminal liability can be imposed on an employer for the acts of his employees. *Id.* at 714. Professor Sayre, after analyzing the cases, concludes:

> "A sharp line must be drawn between true crimes involving serious punishments and petty misdemeanors involving only light monetary fines. Where the offense is in the nature of a true crime, that is where it involves

moral delinquency *or is punishable by imprisonment* or a serious penalty, *it seems clear that the doctrine of respondeat superior must be repudiated as a foundation for criminal liability.*" (at p. 717) (Italics supplied.)

Since Professor Sayre's article in 1930, the problem has grown in dimension and still awaits a clear statement of its solution. This Court has indicated in the *Dotterweich* case that the requirement of personal responsibility must be retained. It is of critical importance that this Court remove the "area of conflict and doubt" which has arisen.

The gross unfairness of the rule applied by the Pennsylvania courts is readily apparent. Here, Appellants operated the coal mine on a two-shift, 16-hour basis. It might just have easily been on a three-shift, 24-hour-a-day basis. For Appellants properly to protect themselves from criminal liability under the state court's decision they would have to be present and superintend the operation of the coal mine 16 hours or 24 hours a day, as the case might be, 52 weeks a year, year in and year out. In addition, such a construction would mean that no one in the situation of Appellant Martin, that is, the financial man rather than a coal expert, could possibly be an executive in a mine operation, for he would be subjecting himself to criminal liability for acts of others, acts he was in no practical position to superintend. It would certainly seem a sufficient protection for the public to have the criminal liability imposed on those persons whose acts actually constitute the criminal act. Whether the employer of the negligent employee should be *civilly* liable is another question entirely; we are here dealing with a question of the deprivation of liberty by the imposition of jail sentences.

2. This Court has often considered the problem whether the language used in a criminal statute as inter-

preted by the State court is sufficiently precise and clear so as fairly to warn possible violators that certain conduct is criminally proscribed.

The interpretation of the statute here involved by the State courts presents this problem in a rather unique context. For it is that interpretation itself which renders the statute vague by the very fact that it differs so drastically from the statute as enacted by the Legislature.

No one reading a criminal statute which requires "negligent guilt" on the part of the defendant could reasonably anticipate criminal liability and the imposition by a court of a jail sentence in the instant situation *i.e.*, complete lack of negligence or of any act at all on the part of the accused.

Thus the conviction should be reversed even assuming that a state legislature has the power to enact a statute which authorizes the jailing of the employer for a criminal act of the employee merely because it is committed in the business of the employer. This is clearly not such a statute.

It is a fundamental rule of due process that a statute must fall, if it is so indefinite that "men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Construction Co.*, 269 U. S. 385, 391. See also *Winters v. New York*, 333 U. S. 507, wherein this Court said:

> "Men of common intelligence cannot be required to guess at the meaning of the enactment. *The vagueness may be from uncertainty in regard to persons within the scope of the act*, Lanzetta v. New Jersey, 306 U. S. 451, 83 L. Ed. 888, 59 S. Ct. 618, or in regard to the applicable tests to ascertain guilt." (Italics supplied.) (at pages 515-516)

Here, a mine operator reading the criminal section of the statute could not know that he would be a person within its scope should a violation of the act be committed by an

employee or independent contractor without his authority or knowledge. Yet, this is the result of the State Court's interpretation of this statute.

This is precisely the type of situation about which this Court said in *United States v. Cardiff*, 344 U. S. 174:

> "The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited. Words which are vague and fluid . . . may be as much of a trap for the innocent as the ancient laws of Caligula." (p. 176)

The statute must therefore be considered as unconstitutionally vague as not providing a definite guide to future conduct. *Winters v. New York*, 333 U. S. 507; See Note, 62 HARV. L. REV. 77 (1948).

Analytically, of course, the problem of vagueness here arises primarily not because of the statutory language as enacted by the Legislature, but because of the interpretation of that language by the Superior Court. Here, in fact, that interpretation so drastically changed the meaning of the statute as to constitute a judicial rewriting of the legislative will.

It is one of the most elementary and fundamental principles of due process and of the basic concept of the division of responsibility between the judiciary and the legislature (Cf. *Sweezy v. New Hampshire* —U. S. —, 25 L. W. 4526 (1957)) that where an act is established as a crime solely by statute (the Superior Court concluded that these acts were crimes only because of the statute and not by common law—Appendix A, *infra*, pp. 18a 19a), then a defendant can be convicted only if his conduct falls strictly within that statute's prohibitory language. This Court has strictly and consistenly applied this principle. In *Viereck v. United States*, 318 U. S. 236 (1943), dealing with an addition by the trial court to the statutory requirements, this Court said:

"The unambiguous words of a statute which imposes criminal penalties are not to be altered by judicial construction so as to punish one not otherwise within its reach, however deserving of punishment his conduct may seem . . . we cannot add to its provisions other requirements merely because we think they might more successfully have effectuated that purpose." (at pages 243-244).

See also *United States v. Evans*, 333 U. S. 483 (1948). In a real sense, this type of judicially-constituted statutory vagueness is far more dangerous than the typical situation of a statute vague on its face. This is true since in cases such as this one, those who are to be governed by the statute receive from reading it a false sense of assurance and believe that they understand properly the acts which are proscribed by it. They do not even have the warning which is supplied to the reader of a statute which is vague on its very face. Since the vagueness does not occur until the statute is rewritten by the judiciary, there is no way for a prospective violator to have any idea that he may conceivably be subjecting himself to criminal liability.

3. The questions presented by the instant case and by the decisions of the court below are substantial and important and do not represent an isolated decision of an inferior court, which, though in error, does not present that recurring type of situation which this Court will review. Statutes imposing regulations on business are in existence in all states. It is of obvious importance that employers know the extent of their criminal liability for criminal acts of their employees. See Book Review, MENS REA IN STATUTORY OFFENSES, 66 YALE L. J. 1120, 1124 (1957).

Moreover, the issue of vagueness involves matters of individual rights, an area rightfully the subject of this Court's continuous solicitous concern.

CONCLUSION.

The questions herein presented are substantial and of public importance and the affirmance by the courts of Pennsylvania has deprived Appellants of rights guaranteed them by the Fourteenth Amendment to the Constitution of the United States.

Respectfully submitted,

WILLIAM T. COLEMAN, JR.,
LOUIS G. HILL,
PHILIP P. KALODNER,
DILWORTH, PAXSON, KALISH & GREEN,
2635 Fidelity-Philadelphia Trust Building,
Philadelphia 9, Pennsylvania,
Attorneys for Appellants.

CURRAN & LAVELLE,
310 West Market Street,
Pottsville, Pennsylvania,
ALVIN E. MAURER, JR.,
124 West Market Street,
Pottsville, Pennsylvania,
Of Counsel.

October 8, 1957.

APPENDIX A.

IN THE COURT OF QUARTER SESSIONS
OF SCHUYLKILL COUNTY

COMMONWEALTH OF PENNSYLVANIA,

v.

AURELIO CANO, CHARLES MARTIN, and CANO AND MARTIN, INC.

No. 553 September Sessions, 1952.

Motion for New Trial and Arrest of Judgment.

Before: PALMER, P. J., CURRAN, DALTON, STAUDENMEIER, JJ.

DONALD D. DOLBIN, for Commonwealth.

JOHN E. LAVELLE, JOHN J. CURRAN and ALVIN E. MAURER, JR., for Defendants.

OPINION OF THE COURT.

DALTON, J.

Defendants Aurelio Cano and Charles Martin operated an anthracite coal mine near Forestville, Schuylkill County, under the name and style of Cano and Martin, Inc. On March 27, 1952, following the firing of a shot of explosives, an underground body of water broke through in the No. 6 breast and flooded the mine. Five men, employees of the defendants, lost their lives in the appalling, tragic and dreadful underground catastrophe.

Thereafter, upon affidavit of the official mine inspector filed pursuant to the Anthracite Mine Law of June 2, 1891, P. L. 176, Art. XVII, Section 1, 52 P. S. Section 511, proceedings were brought charging the defendants with thirteen violations of the Anthracite Mine Law.

Upon demand of the defendants, the case was tried before a jury. At the close of the Commonwealth's case, the trial judge sustained a demurrer as to Cano and Martin, Inc., on the ground that the Commonwealth had produced no evidence of the existence of such corporate entity. The trial judge also sustained a demurrer to the ninth count as to all defendants. The individual defendants then proceeded with their defense as to the remaining twelve counts. The jury found the individual defendants guilty of five counts and acquitted them of the remainder. The defendants have filed motions in arrest of judgment and for a new trial.

Defendants' first contention is that the court erred in refusing their motion to poll the jury, even though it is conceded that the motion was not made until after the jury had been discharged. The original transcript of testimony failed to show the motion, although it did refer to a discussion at side-bar between the trial judge and one of counsel for defendants, at the conclusion of which the trial judge said: "Your motion comes after the jury has been dismissed." Objections were filed to the stenographer's transcript, whereupon a hearing was held pursuant to the Act of May 11, 1911, P. L. 279, Section 4, 12 P. S. Section 1199, and an order was entered directing the transcript to be amended so as to show:

> "* * * that the Court directed the verdict to be recorded after it had been read to the jury; that the Court then spoke to the jury and then directed that they be discharged; that thereafter the Clerk of the Courts was starting to pay the jurors and thereupon John C. Curran, Esq., one of counsel for the defendants, moved that the jury be polled, and that thereupon the Court

refused the motion to poll on the ground that the jury had been dismissed and the motion came too late."

The ruling was clearly correct. Upon its discharge, the jury became defunct as a legal body and was therefore without legal power to alter or amend the verdict, whether by motion to poll or otherwise: Com. v. Johnson, 359 Pa. 287, 291-294.

We do not agree with the defendants' argument now made, that "the premature dismissal of the jury—prevented a motion to poll prior to dismissal." It is the recollection of the trial judge that the verdict of the jury on each of the twelve counts submitted was read to the jury by the clerk, and when the clerk finished reading, nothing was said by any of counsel for the defense nor was there any indication that counsel for defense wished to say anything. Since no motion to poll was made at that time, the trial judge directed the verdict to be recorded; thanked the jury for their services; and discharged them. The motion to poll was not made until the clerk was in the midst of paying the jurors after their discharge and after their separation. It is the recollection of the trial judge that at least ten minutes had then elapsed since the verdict had been directed to be recorded. The defendants had ample opportunity to make a timely motion but they failed to avail themselves of that opportunity before the jury was discharged.

Many of the other questions raised by the defendants relate to rulings of the trial judge on matters of evidence to which the defendants failed to take exceptions. This case was tried prior to the enactment of the Act of July 20, 1953, P. L. 552, which eliminated the necessity of taking an exception to any ruling on the admission or exclusion of testimony. Under the procedural law as it stood at the time of the trial, it was necessary for the defendants to take exceptions to any such ruling if they intended to press it as error; failing to do so, they are deemed to have acquiesced to the ruling: Farnoff v. Wilkinsburg Borough,

238 Pa. 614, 620; Beal v. Atlantic States Motor Lines, 348 Pa. 503, 504; Com. v. Cohen, 103 Pa. Superior Ct. 496, 502. Therefore, the only rulings which can be considered are those few to which an exception was noted.

Defendants urge that the court erred in sustaining objections to certain questions put to the witness Horzusky concerning the location of Horzusky's mine in relation to the Cano-Martin mine. We fail to see how the defendants were prejudiced by those rulings. The witness had already clearly and definitely testified that he didn't know where the Cano-Martin mine was.

Defendants also charge the court with error in sustaining an objection to the following question put to the defendant Martin:

> "Q. Is there, Mr. Martin, if you know, any arrangement between Indian Head Coal Company and Cano and Martin, Incorporated, concerning the development of this property?"

The question was framed in the present tense and therefore related to a situation at the time of the trial and not of the accident. Any mention of an arrangement between Indian Head and Cano and Martin, Incorporated, at the time of trial was clearly irrelevant to the issue of operation at the time of the accident. We see no error in that ruling.

Complaint is further made of the court's ruling in sustaining an objection to the following question:

> "Mr. Martin, from your knowledge of the operations of the Cano-Martin mine, and your knowledge of what you obtained around the surface of this mine, and the reports made from this mine, or from any source, in your opinion, did this mine exercise every precaution for the safety of the workmen?"

The witness was clearly incompetent to express an opinion on that point based upon his own knowledege, since he had already testified that he had never been inside the

mine. Nor was he competent to express an opinion even as an expert on the basis of what some third person may have told him: Howarth v. Adams Express Co., 269 Pa., 280, 283. The assignment is without merit.

Error is further asserted in the court's failure to define "'criminal negligence' as used in the Charge." The answer to that contention is that the court did not use the expression in its charge. Neither is the expression found in the Act of Assembly or in the information filed.

Defendants complain also of the court's failure to define "which mine inspector is meant or intended by law as it relates to Charge Number Ten," wherein defendants were charged with failure to send reports of air measurements to the mine inspector. We are unable to see how defendants have been harmed in view of defendant Cano's admission that no such reports had been sent to any inspector.

The constitutionality of the procedure established by the Anthracite Mine Law, Art. XVII, Section 1, 52 P. S. Section 511, is also attacked. This is a renewal of the question which defendants raised preliminarily by petition and rule to dismiss the prosecution. President Judge Palmer, speaking for the court, held that the procedure was constitutional. We adhere to that ruling.

Defendants are on firmer ground in their challenge to Art. XII, Rule 1, of the Act, 50 P. S. Section 281, which requires the owner, operator or superintendent to "use every precaution to insure the safety of the workmen in all cases, whether provided for in this act or not." The first count of the information charged defendants with violation of that rule. Defendants contend that the rule is too vague and indefinite to predicate criminal liability upon it. The above quoted language was considered by the Supreme Court in the civil case of Prattico v. Hudson Coal Company, 347 Pa. 490, and was held to be too indefinite to impose any statutory duty beyond those specifically defined in the act. Quoted from Reeder v. Lehigh Valley

Coal Co., 231 Pa. 563, the Court said in the Prattico case at p. 492: "Statutory duties do not arise by implication but must be imposed by express legislative authority. When the legislature takes a step in advance of the common law and imposes additional burdens upon an employer in order to meet the necessities of modern industrial growth, the new duties thus imposed should be so clearly set forth as to leave no doubt as to the legislative intention. There should be no such thing as a doubtful statutory duty." If the language of the above quoted rule is too vague and indefinite to impose civil liabality, it certainly cannot support criminal liability. The Supreme Court of the United States held that "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." Connally v. General Construction Co., 269 U. S. 385, 391, 70 L. Ed. 322, 328; Champlin Refining Co. v. Corporation Commission, 286 U. S. 210, 242, 76 L. Ed. 1062, 1082. As our own Supreme Court said in Com. v. Zasloff, 338 Pa. 457, 464: "* * * in creating an offense which was not a crime at common law, a penal statute must lay down a reasonably ascertainable standard of guilt; it must be sufficiently explicit to enable a citizen to ascertain with a fair degree of precision what acts it intends to prohibit, and therefore what conduct on his part will render him liable to its penalties." We think the defendants' contention in this regard is well taken and we will therefore arrest judgment on the first count.

The remaining questions raised are whether the court erred in overruling the demurrer to the evidence and in refusing to direct a verdict in defendants' favor on the four other counts on which they were convicted. The refusal to sustain the demurrer cannot be reviewed because the defendants offered evidence following its refusal: Com. v. Spanos, 167 Pa. Superior Ct. 629, 631. The only question that can properly be considered is whether the evidence

at the close of the case was sufficient to submit those four counts to the jury.

Defendants contend that a verdict should have been directed in their favor on all counts because there was evidence that the immediate lessee was a corporation. That evidence, however, was adduced by the defendants, not by the Commonwealth, and since it was entirely oral its credibility was exclusively for the jury to decide: Com. v. Gabelli, 177 Pa. Superior Ct. 608, 616.

Defendants were charged in the second count with violation of Art. XII, Rule 15 of the Anthracite Mine Law, 52 P. S. Section 286, which requires the establishment of a stopping distance not less than 100 feet from inaccessible workings likely to contain a dangerous accumulation of water or gas and the drilling of test holes not less than 20 feet in advance of the working face. There was ample evidence to support the conviction on that count. Defendants knew they were not mining a virgin vein. They had encountered an abandoned bootleg hole about 150 feet from the mouth of the slope and had been required to take steps to control the water in that hole. They had no definite information as to the whereabouts of all the parts of that abandoned operation and in fact, according to the testimony of defendant Cano, they were drilling southward out of the gangway in the Holmes vein toward the Primrose vein "looking for old workings." Yet no stopping distances were established nor was any drilling ahead done in the breasts being worked in the Holmes vein, although common prudence should have dictated drilling ahead since the exact whereabouts of the old workings was unknown. The result was a catastrophic flood which took the lives of five men.

The seventh count charged defendants with violating Art. IV, Section 14, 52 P. S. Section 356, which provides that an efficient brake shall be attached to every drum that is used for lowering or raising persons or material in any mine. The charge is supported by the testimony of the

witness Slane, who was the hoisting engineer and who testified that there was no brake directly on the drum of the hoist.

The tenth count charged a violation of Art. X, Section 16, 52 P. S. Section 564, which requires a monthly report of air measurements to be sent to the inspector. Defendant Cano admitted that the reports were not made. He said he didn't know who the mine inspector for the district was, but so far as appears from the record he made no effort to acquire that information. Defendants' sole argument here is that the failure to send in reports could not have resulted in an accident. We cannot accept that line of reasoning. The purpose of the reports is to acquaint the inspector with the conditions under which the mine is being operated and, if the reports indicate insufficient quantities of air, to enable the inspector to take preventive action before an accident occurs.

The twelfth count charged a violation of Art. XII, Rule 26, 52 P. S. Section 421, which limits the amount of explosives which may be kept at any one time in any one place within a mine. The testimony shows that the inspector found 300 pounds of explosives at the foot of the slope. Defendant Cano admitted that 150 pounds would be sufficient for the two shifts employed. Defendants argue that this admitted violation could not have caused a serious accident. That contention is so obviously fallacious as to require no comment.

And Now, September 19, 1956, judgment is arrested on the first count of the information. Defendants' motions for new trial and in arrest of judgment as the second, seventh, tenth, and twelfth counts are refused. Defendants are directed to appear for sentence on October 1, 1956, at 10:00 A. M., E. D. T., in Courtroom No. 2.

By the Court,

Dalton, J.

And Now, September 19, 1956, an exception is allowed defendants and bill sealed.

By THE COURT,
Dalton, *J.*

Judge Curran Dissents.

IN THE COURT OF QUARTER SESSIONS OF SCHUYLKILL COUNTY

No. 553
September Sessions, 1952

COMMONWEALTH OF PENNSYLVANIA,

v.

AURELIO CANO, CHARLES MARTIN, and CANO AND MARTIN, INC.

Motion for New Trial and Arrest of Judgment

Before: PALMER, P. J., CURRAN, DALTON and STAUDENMEIER, JJ.

DONALD D. DOLBIN, ESQ., for Commonwealth.

JOHN E. LAVELLE, JOHN J. CURRAN, and ALVIN E. MAURER, JR., Esqs., for Defendants.

DISSENTING OPINION

CURRAN, J.

One of the reasons assigned by the defendants in their motion for a new trial was the refusal of the Trial Court to allow the defendants' motion to poll the jury because the motion was made too late. The record indicates that a motion was made after the verdict was read by the Clerk of the Courts, before the verdict was recorded, while the jurors were present in the courtrom, the Clerk of the Courts was "starting to pay the jurors," the stenographer was present, the Judge was on the bench, the jurors had not dispersed, and the Court was not adjourned.

In my opinion, the case falls clearly within the law as found by Jones, Justice, in the case of Commonwealth v. John Martin, Appellant, 379 Pa. 587; 109 A. 2d 325. The facts in the present case are similar and in many respects almost identical with the facts as disclosed in the opinion of Justice Jones, Commonwealth v. Martin, supra. The law as there recited applies with equal emphasis here.

IN THE SUPERIOR COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

v.

AURELIO CANO, CHARLES MARTIN, and CANO AND MARTIN, INC.

No. 52, October Term, 1957
Appeal of AURELIO CANO

No. 53, October Term, 1957
Appeal of CHARLES MARTIN

Appeals From Judgments of Sentence of the Court of Quarter Sessions of Schuylkill County at No. 553, September Term, 1952.

No. 131

OPINION

(Filed: December 28, 1956)

By RHODES, P. J.

Aurelio Cano and Charles Martin, defendants, were convicted and sentenced in the Court of Quarter Sessions of Schuylkill County for violation of the Anthracite Mine Law, Act of June 2, 1891, P. L. 176, as amended, 52 PS § 71 et seq. They have appealed to this Court.

The defendants were arrested on a warrant issued by President Judge Palmer on August 1, 1952, as a result of an affidavit filed by an anthracite mine inspector pursuant to Article XVII, § 1 of the Law, 52 PS § 511, charging them with being negligently guilty of thirteen violations of the

Law. There was no presentment to or indictment by the grand jury as the procedure in the Law provided otherwise. The prosecution arose out of an occurrence in defendants' mine on March 27, 1952, in which five miners lost their lives when the mine was flooded from adjacent workings. Defendants were not charged in these proceedings with any crime directly related to the deaths.

Defendants objected to the proceeding on constitutional grounds. Upon dismissal of their objections they demanded a jury trial under the provisions of the law, 52 PS § 511; in due course they were brought to trial before Judge Dalton. At the trial a demurrer was sustained as to the corporate defendant, Cairo and Martin, Inc. The ninth count in the information was dismissed at the request of the Commonwealth. The twelve counts or charges remaining against defendants were submitted to the jury. They were acquitted on seven counts and convicted on five counts. Motions in arrest of judgment and for a new trial were filed. The court in banc refused the motion for a new trial as to all counts in the information, but granted the motion in arrest of judgment on the first count. On each of the four counts remaining (2d, 7th, 10th, and 12th) defendants were sentenced to the maximum penalty of a $500 fine and three months in the county prison, 52 PS § 511, or a total fine of $2,000 and one year in the county prison. Appeals having been taken to this Court, a supersedeas was granted by the court below over the objection of the trial judge who was of the opinion that the records of these defendants indicated that a supersedeas was unwarranted.

Defendants raise a number of questions on appeal. They relate to the constitutionality of the procedure, the refusal of their motion to poll the jury, the charge of the trial judge, the sufficiency of the evidence, and the rulings of the trial judge on the admissibility of certain evidence.

Defendants contend that the procedure which was followed—the filing of an affidavit charging them with violations of the Anthracite Mine Law, and the issuance of a

warrant by the judge of the Court of Quarter Sessions of Schuylkill County, in accordance with Article XVII, § 1, of the Law, 52 PS § 511—violates Article I, § 10 of the Constitution of this Commonwealth, PS Const. Art. I, § 10, which provides: "No person shall, for any indictable offense, be proceeded against criminally by information, . . ." It is contended that the absence of a bill of indictment by the grand jury renders the statutory procedure invalid.[1] The procedure by information in the sense that it is used in the Pennsylvania Constitution refers exclusively to practices formerly used in England whereby, upon information in the King's Court by some person, the accused was put on trial without further inquiry or investigation. Com. ex rel. Stanton v. Francies, 250 Pa. 496, 500, 501, 95 A. 527; Com. ex rel. Wheeler v. Francies, 58 Pa. Superior Ct. 266, 267; Com. ex rel. Scasserra v. Maroney, 179 Pa. Superior Ct. 150, 153, 115 A. 2d 912. The absence of an intervening indictment by the grand jury would render this procedure unconstitutional if the offenses for which these defendants were tried are "indictable offenses" within the meaning of the Constitution. Com. v. Wadley, 169 Pa. Superior Ct. 490, 493, 83 A. 2d 417. The legislature cannot abolish the grand jury or remove this method of criminal procedure for "indictable offenses." Com. v. Liebowitz, 143 Pa. Superior Ct. 75, 80, 17 A. 2d 719; Dauphin County Grand Jury Investigation Proceedings (No. 2), 332 Pa. 342, 353, 354, 357, 2 A. 2d 802. See, also, Hartranft's Appeal, 85 Pa. 433, 453, where, in a dissenting opinion, Chief Justice Agnew stated that the grand jury is

1. Although we have the benefit of an extended brief on this question from defendants, counsel for the Commonwealth dismiss the issue with the erroneous assumption that the question is improperly raised because the defendants did not appeal from the preliminary order and decision dismissing the jurisdictional objection. The order dismissing this objection was interlocutory and not appealable at that time, but the question is now properly before us. See Com. v. Wideman, 150 Pa. Superior Ct. 524, 525, 526, 28 A. 2d 801; Com. v. Trufley, 170 Pa. Superior Ct. 200, 202, 85 A. 2d 622.

"one of the boasted bulwarks of English liberty handed down to us, and protected by the Declaration of Rights."

At common law the method of proceeding by information was not offensive generally, and an indictment by a grand jury was required only in cases involving capital crimes and felonies. "By the law of England, informations by the Attorney-General, without the intervention of a grand jury, were not allowed for capital crimes, nor for any felony, by which was understood any offense which at common law occasioned a total forfeiture of the offender's lands, or goods, or both. 4 Bl. Com. 94, 95, 310. The question whether the prosecution must be by indictment, or might be by information, thus depended upon the consequences to the convict himself." Ex parte Wilson, 114 U. S. 417, 423, 5 S. Ct. 935, 29 L. Ed. 89, 91. See 42 C. J. S., Indictments and Informations, § 9, p. 837. It seems that, when this common law safeguard was recognized in the United States, it apparently assumed a greater area of protection. See 42 C. J. S., Indictments and Informations, § 9 (b), p. 838. The Pennsylvania Constitution and the constitutions of a number of states provide that proceedings by information are prohibited when the offense is an "indictable" offense. The Fifth Amendment to the Constitution of the United States provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . ." Although the language used in the Constitution of the United States and in the constitutions of various states, including Pennsylvania, could be interpreted as limiting their application to capital crimes and felonies as at common law they have not been so restricted. These provisions have been given a more extensive application, and the test generally applied in determining whether an indictmnt is necessary relates to the extent of the punishment which may be imposed. It has been held in Kentucky, under a constitutional provision virtually the same as

in Pennsylvania, that the term "indictable offense" refers to common law and statutory offenses, the punishments for which are "infamous," such as death or imprisonment in a penitentiary as distinguished from imprisonment in a county jail. Perry v. Bingham, 265 Ky. 133, 95 S. W. 2d 1099, 1100, 1101; Lakes v. Goodloe, 195 Ky. 240, 242 S. W. 632, 639, 640. This is similar to the test under the Federal Constitution which is whether the accused is made subject to punishment by imprisonment in a penitentiary or at hard labor. See Brede v. Powers, 263 U. S. 4, 44 S. Ct. 8, 68 L. Ed. 132; Mackin v. United States, 117 U. S. 348, 350, 351, 6 S. Ct. 777, 29 L. Ed. 909, 910, 911; Ex parte Wilson, supra, 114 U. S. 417, 423, 5 S. Ct. 935, 29 L. Ed. 89, 91. A statutory crime which is punishable by imprisonment at hard labor or by a fine is considered infamous because imprisonment may be imposed. United States v. Moreland, 258 U. S. 433, 42 S. Ct. 368, 66 L. Ed. 700. It will be observed that the controlling consideration under the federal rule is imprisonment in a penitentiary or at hard labor.

Our decisions indicate that the provision of Article I, § 10, of the Pennsylvania Constitution was not intended to be limited to capital offenses and felonies, but that it applies also to the more serious indictable common law misdemeanors and statutory misdemeanors which the Legislature intends should be indictable. Mansfield's Case, 22 Pa. Superior Ct. 224, 234; Mountain v. Com., 68 Pa. Superior Ct. 100, 102; Allen v. Com. 77 Pa. Superior Ct. 244, 246, 247; Com. ex rel. City of Pittsburgh v. Heiman, 127 Pa. Superior Ct. 1, 9, 10, 190 A. 479; Com. ex rel. Marsh v. Lindsey, 130 Pa. Superior Ct. 448, 450, 451, 198 A. 512.

Defendants argue that the offenses charged under the Anthracite Mine Law were offenses which could have been punished at common law under the rule of Com. v. McHale, 97 Pa. 397, 408. In the latter case the Supreme Court said that the test for determining which offenses are indictable in Pennsylvania as common law offenses is not whether the precise definition of the crime can be found in the English

texts or reported cases, but rather whether the offenses presently charged might have been punished at common law. It is there stated (page 408 of 97 Pa.): "What is a common law offense? The highest authority upon this point is Blackstone. In chap. 13 of vol. 4, of Sharswood's edition, it is thus defined. 'The last species of offenses which especially affect the Commonwealth are those against the public [peace] or economy. By the public [peace] and economy I mean the due regulation and domestic order of the kingdom, whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood and good manners, and to be decent, industrious and inoffensive in their respective stations. This head of offenses must therefore be very miscellaneous, as it *comprises all such crimes as especially affect public society*, and are not comprehended under any of the four preceding series. These amount some of them to felony, and others to misdemeanors only'." The Supreme Court then held that the making of false and fraudulent entries in a book of voters, the depositing of false and fraudulent ballots, and the false and fraudulent counting of ballots at an election were indictable as common law offenses under this rule. There have been other instances in which conduct was indictable as a common law offense in the absence of specific common law precedent or statutory declaration.[2] In the McHale and subsequent cases, the inquiry whether the conduct amounted to a common law offense under this miscellaneous category was for the purpose of determining whether the Commonwealth was em-

2. For example, see the following cases: Com. v. Mochan, 177 Pa. Superior Ct. 454, 457, 458, 110 A. 2d 788 (numerous telephone calls to a married woman soliciting adultery, suggesting sodomy, and using vile language); Com. v. DeGrange, 97 Pa. Superior Ct. 181, 186 (indecent assault, because: " 'Whatever openly outrages decency and is injurious to public morals is a misdemeanor at common law' "); Com. v. Flaherty, 25 Pa. Superior Ct. 490, 492, 493 (attempt to commit larceny).

powered to prosecute the accused for such conduct. See The Penal Code, June 24, 1939, P. L. 872, § 1101, 18 PS § 5101. Here the inquiry is whether a statutory offense is "indictable" within the meaning of the constitutional provision. An offense may come within the McHale rule of common law offenses and still not be indictable, as not all offenses were indictable at common law. Ex parte Wilson, supra, 114 U. S. 417, 423, 5 S. Ct. 935, 29 L. Ed. 89, 91. Summary proceedings were also recognized at common law; and, while some petty offenses might conceivably fall within the broad miscellaneous category of the McHale rule, they may nevertheless be properly prosecuted without an indictment. See Com. ex rel. City of Pittsburgh v. Heiman, supra, 127 Pa. Superior Ct. 1, 7, 10, 190 A. 479. If there is no specific common law or statutory procedure established for an offense which comes within the McHale rule, the Commonwealth is permitted to proceed in the usual manner, that is, by indictment. It is one thing to say that an indictment may lie in the absence of a specific common law or statutory procedure and another thing to say that the Constitution requires such an indictment. See 42 C. J. S., Indictments and Informations, §§ 8, 9, p. 837; 1 Wharton's Criminal Law, 12th Ed., § 30, p. 47; Com. ex rel. Barr v. Naylor, 34 Pa. 86, 89.

Moreover, we do not agree with defendants' contention that the charges against them, in the absence of the statute, would have been indictable as common law offenses. Defendants were charged and tried under Article XVII, §1 of the Law, 52 PS § 511, for having been "negligently guilty of an offense against the provisions of this act, whereby a dangerous accident had resulted or might have resulted to any person or persons employed in such mine . . ." The four alleged violations, of which they were convicted and for which they were sentenced, relate to the following: (1) Failure to take the precautions prescribed by Rule 15 of Article XII of the Law, as amended, 52 PS § 286, when approaching inaccessible workings

which were likely to contain water or gas (second count); (2) failure to provide an efficient brake on every drum for lowering or raising persons or materials in the mine, as required by Article IV, § 14 of the Law, 52 PS § 356 (seventh count); (3) failure to send reports of air measurements in the mine to the mine inspector, as required by Article X, § 16 of the Law, 52 PS § 564 (tenth count); and (4) improper and unsafe storage of explosives used in the mine contrary to Rule 26 of Article XII of the Law, 52 PS § 421 (twelfth count). We think it is obvious that these offenses are not within the McHale definition of common law offenses. Except as such conduct has been prohibited by this statute, they do not offend against the public peace, morals, or economy, or the due regulation and domestic order of the Commonwealth. Although the Legislature, under the valid exercise of its police power, did regulate the business of mining by this statute for the safety of miners, it is only by virtue of the statute that the failure to act in accordance therewith is made a punishable offense. The conduct of defendants was not necessarily offensive in itself, and in our judgment it would not have been so at common law.[3] The conduct regulated by the statute is not similar to that in the McHale or subsequent cases. In Com. v. McHale, supra, 97 Pa. 397, there was fraud, in Com. v. Mochan, 177 Pa. Superior Ct. 454, 110 A. 2d 788, and Com. v. DeGrange, 97 Pa. Superior Ct. 181, there were lewd, immoral, and indecent acts, and in Com. v. Flaherty, 25 Pa. Superior Ct. 490, there was an attempt to commit larceny which is a crime. If the contention of

3. Defendants refer to several English cases where persons charged with duties in and about mines were indicted for manslaughter when they were criminally negligent in those duties and persons were killed. That is distinguishable from the present situation. Defendants here are not on trial for manslaughter as a result of the deaths of the five miners killed in the flood, but for the lesser crime of violating the statutory regulations, the punishment for which is no more than a $500 fine or imprisonment in the county jail for three months or both. See Allen v. Com., 77 Pa. Superior Ct. 244, 247.

defendants is correct and the McHale rule is given such a broad interpretation, it would follow that nearly every newly created statutory offense would have to be considered a common law offense. As we view it this is not the scope of the McHale rule. It is applicable only to such conduct which is inherently offensive to the public peace, morals, and economy, and not to that which is within the power of the Legislature to prescribe as new crimes. See I Wharton's Criminal Law, 12th Ed., § 28, p. 43; 22 C. J. S., Criminal Law, § 8, p. 58. The Legislature has the power to prescribe new offenses and provide penalties therefor, and it may set forth the procedure by which a person charged with the commission thereof may be tried and his guilt or innocence determined. It may do this without the new statutory offense necessarily taking on the attributes of a common law offense and becoming thereby indictable within the meaning of the constitutional provision.[4] Van Swartow v. Com., 24 Pa. 131, 133, 134; Allen v. Com. 77 Pa. Superior Ct. 244, 247. Cf. Com. ex rel. City of Pittsburgh v. Heiman, supra, 127 Pa. Superior Ct. 1, 6-10, 190 A. 479. As we have said, summary proceedings were recognized at common law, and the Legislature may provide this means of prosecution when it considers the offense created of a petty nature or of lesser gravity than an indictable offense. See Duke v. United States, 301 U. S. 492, 495, 57 S. Ct. 835, 81 L. Ed. 1243, 1245. The error in defendants' contention is not only in giving a broad inter-

4. The following cases relate to the validity of statutory offenses for which the Legislature prescribed summary procedures without the intervention of a grand jury: Allen v. Com., 77 Pa. Superior Ct. 244, 247 (cruelty to animals); Com. ex rel. Marsh v. Lindsey, 130 Pa. Superior Ct. 448, 450, 451, 198 A. 512 (compulsory school attendance); Van Swartow v. Com., 24 Pa. 131, 133, 134 (prohibiting sale of spirituous liquors on the Sabbath, an offense which the court stated was "not a suit at common law, but a criminal proceeding under a special statute"); Com. v. Waldman, 140 Pa. 89, 21 A. 248 (performing worldly employment on the Sabbath); Com. v. Mecca Cooperative Co., 60 Pa. Superior Ct. 314, 317 (regulating hours and conditions of employment of minor females).

pretation to the McHale rule and making it applicable to almost every newly created offense which may be connected in some way with the public peace, morals, or economy, but also in extending the rule so that every offense which may be said to fit that broad definition is of necessity an indictable offense.

The fact that the Legislature declared the violations with which defendants are charged to be misdemeanors (52 PS § 514) does not make them indictable offenses. The Legislature indicated its intention in this respect by providing a special procedure for prosecution of these offenses. It is true that the general and customary meaning of the word misdemeanor is an indictable offense not amounting to a felony (Com. ex rel. Marsh v. Lindsey, supra, 130 Pa. Superior Ct. 448, 450, 198 A. 512), but the use of the term misdemeanor may also include offenses not punishable by indictment. "But if it be true that the word [misdemeanor] includes all indictable offenses below the grade of felony, it does not follow it may not with propriety be used by the legislature to designate a class of petty offenses not known to the common law, and not necessarily indictable" Allen v. Com., supra, 77 Pa. Superior Ct. 244, 248. See, also, Com. v. Mecca Cooperative Co., 60 Pa. Superior Ct. 314, 317, where a summary offense was likewise designated by the Legislature as a misdemeanor. The Legislature here, as in the Allen and Mecca cases, although designating the offenses involved misdemeanors, clearly indicated that they were not of sufficient severity to be indictable; the punishment is by fine or simple imprisonment in the county prison for three months or both. In other sections of the Law (i.e., Article I, § 1, as amended, 52 PS § 71), the Legislature provided summary conviction as the method of enforcement, although the summary offenses are included in the declaration that all offenses under the Law are misdemeanors (52 PS § 514). With respect to violations punishable under Article XVII, § 1, 52 PS § 511, presently before us, the

Legislature indicated that, when the violation involved negligence and was likely to cause a dangerous accident, the punishment should be greater and the prosecution should be conducted in conformity therewith. It thus provided for a trial in the court of quarter sessions and before a jury if the defendants so desire. These statutory offenses were within the power of the Legislature to create. They were not crimes at common law. They are more serious than summary offenses, although they are not of the magnitude of indictable misdemeanors. See Duke v. United States, supra, 301 U. S. 492, 495, 57 S. Ct. 835, 81 L. Ed. 1243, 1245; United States v. Sloan, 31 F. Supp. 327; United States v. Lomas, 60 F. Supp. 198; Falcone v. United States, 6 Cir., 280 F. 766; Kempe v. United States, 8 Cir., 151 F. 2d 680.

The second question raised on behalf of defendants relates to the trial judge's refusal to permit a poll of the jury. When a motion to poll the jury is timely made by the Commonwealth or by a defendant it should be granted. Com. v. Martin, 379 Pa. 587, 592, 593, 109 A. 2d 325. The controversy in the instant case is whether the motion was made too late. The original transcript of the events at the trial was ambiguous in this respect. After objections were filed and a hearing held, the record was amended by the court below. In passing upon the allegation of defendants that the motion was timely under the circumstances, the court in its opinion said: "The original transcript of testimony failed to show the motion, although it did refer to a discussion at side-bar between the trial judge and one of counsel for defendants, at the conclusion of which the trial judge said: 'Your motion comes after the jury has been dismissed.' Objections were filed to the stenographer's transcript, whereupon a hearing was held pursuant to the Act of May 11, 1911, P. L. 279, Section 4, 12 P. S. Section 1199, and an order was entered directing the transcript to be amended so as to show:

"'. . . that the Court directed the verdict to be recorded after it had been read to the jury; that the Court then spoke to the jury and then directed that they be discharged; that thereafter the Clerk of the Courts was starting to pay the jurors and thereupon John C. Curran, Esq., one of counsel for the defendants, moved that the jury be polled, and that thereupon the Court refused the motion to poll on the ground that the jury had been dismissed and the motion came too late.'

"The ruling was clearly correct. Upon its discharge, the jury became defunct as a legal body and was therefore without legal power to alter or amend the verdict, whether by motion to poll or otherwise: Com. v. Johnson, 359 Pa. 287, 291-294 [59 A. 2d 128].

"We do not agree with the defendants' argument now made, that 'the premature dismissal of the jury . . . prevented a motion to poll prior to dismissal.' It is the recollection of the trial judge that the verdict of the jury on each of the twelve counts submitted was read to the jury by the clerk, and when the clerk finished reading, nothing was said by any of counsel for the defense nor was there any indication that counsel for defense wished to say anything. Since no motion to poll was made at that time, the trial judge directed the verdict to be recorded; thanked the jury for their services; and discharged them. The motion to poll was not made until the clerk was in the midst of paying the jurors after their discharge and after their separation. It is the recollection of the trial judge that at least ten minutes had then elapsed since the verdict had been directed to be recorded. The defendants had ample opportunity to make a timely motion but they failed to avail themselves of that opportunity before the jury was discharged."

Counsel for defendants testified at the hearing to correct the record that there were no intervals of sufficient duration within which to make the motion from the time the jury entered the jury box to give their verdict until the time they were discharged and paid. But they do not in any material respect contradict the corrected record or the recollection of the trial judge. The trial judge recalled that after the clerk finished reading the verdict to the jury nothing was said by counsel for defendants, and that there was no indication that they wished to say anything. On this point one of defense counsel testified: "*Almost* immediately after Mr. Zweibel [the clerk] finished speaking, the Court began addressing the jury, and he thanked the jury for their services in this case, . . ." [Italics supplied.] It was then that defense counsel could have indicated their desire to make a motion. It is significant that the testimony of each of defense counsel at the hearing to correct the record shows that the first move they made to obtain the court's attention or to request the poll was after the trial judge had dismissed the jury. We think defense counsel were required to give some indication to the court prior to the discharge of the jury that they desired to be heard. We recognized that it may not have been proper for them to interrupt the trail judge while he was speaking to the jury, but they could have indicated that they wanted his attention after the clerk had concluded. We do not minimize the importance of having the jury polled, but we find no events so continuous as to preclude an opportunity for defense counsel to attract the attention of the trial judge for the presentation of a motion. As the record and the recollection of the trial judge now indicate, the disposition of the matter appears to have been correct.

Defendants' third contention is that the trial judge erred in several respects concerning defendants' requests for clarification of the charge to the jury. It is argued that he did not adequately explain the standard of negligence required for a conviction under the statute. The

points for charge submitted by defense counsel on this subject were affirmed by the trial judge and read to the jury.[5]

After the trial judge read the submitted points to the jury counsel requested orally that the judge charge further on the standard of "criminal negligence." The trial judge properly refused to do so, as the points submitted by defendants and read to the jury more than adequately met the prescribed standard. The Law does not use the term "criminal negligence"; it merely provides a penalty for persons found "negligently guilty" of violating its provisions. But the degree of negligence required does not approach that of criminal negligence, that is, a reckless or culpable negligent act. See Com. v. Aurick, 342 Pa. 282, 289, 19 A. 2d 920; Com. v. Stosny, 152 Pa. Superior Ct. 236, 241, 31 A. 2d 582. Other matters involving instructions and the refusal of a request for amplification relate to charges upon which verdicts of not guilty were returned. If the refusal of any further explanation to the jury could be considered error, it was harmless and requires no review at this time: Com. v. Haun, 27 Pa. Superior Ct. 33, 38.

Defendants' fourth question in the statement of questions involved relates to the sufficiency of the evidence to

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5. The trial judge affirmed and read the following points to the jury:

"2. In order to convict these defendants, you must find that they were guilty of negligent violations of the provisions of the mining code. And in this connection mere negligence is not sufficient. In order to convict either of these defendants, you must be satisfied beyond a reasonable doubt that they were guilty of that degree of neglect which can be characterized as criminal. . . .

"7. The showing of a mere violation of the provisions of the mining law is not sufficient; the violation must be shown to be negligent. The law does not impute negligence to a violation which is not committed deliberately or ignorantly. The law does not impute negligence to an honest error of judgment. . .

"8. If you find that any of the violations were the result of honest errors of judgment, and were not the result of negligence, then you must find the defendants not guilty of such violations which amounted to honest errors of judgment."

support convictions on the second and tenth counts. The second count pertains to the establishment of stopping distances and the starting of test holes when approaching inaccessible workings which are likely to contain water or gas. Rule 15, Article XII of the Law, as amended, 52 PS § 286, upon which the charge was based, provides in part: "Whenever a place is approaching inaccessible workings, which are likely to contain a dangerous accumulation of water or gas, the operator shall establish and clearly show on the map furnished the mine foreman a stopping distance not less than one hundred (100) feet from the said inaccessible workings and such stopping point shall not be passed until after the coal company officials, the mining engineer and the mine inspector have agreed on the width of any such approaching place or places and the point or distance at which test holes shall be started. The said test holes shall not be less than twenty (20) feet in advance of the working face." It is argued that there is no evidence to establish that defendants had knowledge of any inaccessible workings which they might be approaching except two—one 1,625 feet west of the face of the mine, and the other encountered near the slope of their mine which they had passed. We think the evidence substantiates the charge in the second count of the information. Defendants began their operation several months prior to the accident on March 27, 1952. Their mine is located in the Holmes vein which runs east and west near what is known as the York Tunnel. There are certain abandoned workings located in the Holmes vein between defendants' mine and the York Tunnel. They were indicated as follows: The Oakill Mine approximately 2,000 feet to the west; the Kramer Mine 1,500 feet west; the Herman Mine 900 feet west; and two slopes of the New Minersville or Horzusky Mine, one approximately 800 feet west, and the other approximately 600 feet west of defendants' mine. Defendants were working westwardly toward the York Tunnel. Mr. Oakill, who had worked the Oakill Mine in the 1930's had a conversation with the defendant

Cano when defendants were beginning their operation and informed him of his own workings 2,000 feet away, warning him that defendants' mine was heading into water and that they would "hole into" Oakill's abandoned workings. Approximately 150 feet west of their slope defendants encountered an abandoned bootleg working. One of the employes discussed this working and its water hazard with defendant Cano, and some precautions were taken to control the water coming therefrom by means of a dam and pump. Stopping distances were set by defendants with respect to this old working in breasts Nos. 1 and 2 but not for the other breasts. Breast No. 6, for which no stopping distance was set, is the one in which the water broke through and in which the miners were drowned. Defendant Cano testified that no stopping distances were set for breasts Nos. 6 and 7 because he knew of no old workings which those breasts were approaching, and that no instructions were given for drilling ahead for old workings with respect to these breasts.

If an operator has specific knowledge of an old working which he is approaching, the rule requires the notation thereof on a map, the establishment of stopping distances, and a conference with the mine engineer and mine inspector before proceeding. It also requires the carrying of test holes in making the approach. If a specific old working is known, the failure to comply is a violation. It is true that defendants took certain precautions to control the known quantity of water when they encountered the old working 150 feet west of their slope. They did not, however, fully comply with Rule 15. They set stopping distances for only two of the breasts, and they did not call in the mine engineer or the mine inspector before continuing westward; they merely assumed that they had passed the old working in their other breasts. The evidence indicates that the full extent of the old bootleg working was not apparent, and that defendants did not fully investigate it. Defendant Cano testified that he climbed out breast No. 3

into the old mine for approximately 60 or 70 feet and found no water; and he apparently assumed that the rest of the working was dry. No further investigation of this old working appears to have been made. The Deputy Secretary of Mines, who investigated after the accident, testified that Cano admitted knowing of the old mine, and that the investigation indicated that breast No. 6 might have been approaching workings which stemmed from this bootleg slope. Since defendants knew of this bootleg mine and had taken some steps to control the water therefrom without fully complying with the provisions of Rule 15, they cannot now say that they were not negligent because they had no knowledge of specific old workings which breast No. 6 was approaching. Moreover, one of defendants' employees, who was working in breast No. 6, testified that the fact that they were approaching old workings was called to the attention of defendants two weeks prior to the accident. In response to a question whether he discussed drilling ahead with the employe in charge of his shift, the witness answered without objection: "I did; being as the men that were working there had a conversation on old workings and bootleg holes ahead of us there, why, and the coal being so wet in the face all the time. I sort of thought it would be a good thing to ask about a drill to drill ahead, which I did, and the answer he gave me, he said he did ask [defendants] about it, but he was told we were lucky to have a drill to cut a drill of coal." Defendants did not object to this testimony or make any denial of the incident. Cano in fact testified that in another part of the Holmes vein they had a man drilling ahead for old workings, but that he did not drill ahead in this part of the mine. In view of the fact that this was not a virgin vein of coal, that defendants knew of some old workings, that they were told of water ahead, that they were looking for old workings in other parts of the same vein, and that they were requested by a miner in breast No. 6 to provide a drill because of bootleg holes ahead, it cannot be con-

tended seriously that they were unaware of the danger they were approaching. The inference clearly arises that they knew or should have known of the bootleg workings, and that they were negligent in failing to take the required precautions to prevent such an accident as occurred. They cannot now plead their purported ignorance of conditions, and say that they knew of no specific old working ahead. Their negligence is what Article XVII, § 1 of the Law, 52 PS § 511, was designed to cover. There can be no doubt that the Legislature did not intend that stopping distances and test holes be required only if there is actual knowledge of a specific old working, or that operators such as defendants who have knowledge of portions of old workings without knowing the nature and specific location thereof be excused. Accidents sought to be avoided by Rule 15, 52 PS § 286, are more likely when the full extent of the danger is not ascertained. We think the rule was applicable and properly applied to defendants.

In connection with this violation it is also contended that the trial judge improperly charged the jury with respect to the duty imposed by Rule 15, 52 PS § 286. The trial judge originally made an erroneous statement of the Law, but at the request of counsel it was corrected and the entire provision read to the jury. Defendants accepted this correction, and they made no further request for amplification or clarification. Under the circumstances, the contention is not well taken.[6]

Defendants also complain of the refusal of their motion for directed verdict on the tenth count, which charged them with being negligently guilty of violating Article X, § 16 of the Law, 52 PS § 564. This section requires that reports

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6. Defendants also contend that there is no evidence in the record that defendant Martin had knowledge of any old workings. Martin testified that he had no knowledge of old workings or water anywhere. The other testimony indicated, however, that both he and Cano were in charge of the mine and that at the time of the accident Martin was in charge.

of air measurements be sent to the mine inspector. Defendants admit that they sent no air reports to any mine inspector, and that they therefore technically violated this section of the Law. But they argue that the failure to send in the reports is not a violation of a provision of the Law whereby a dangerous accident resulted or might have resulted to persons employed in the mine within the meaning of Article XVII, § 1, 52 PS § 511. In a sense the failure to send in reports may not be likely to cause an accident, but the purpose of the reports is to apprise the mine inspector of the air measurements so that an accident can be prevented if the proper proportion of air is not maintained. Article X, § 16, 52 PS § 564, must be read in conjunction with Section 4 of the same Article, 52 PS § 553, which states that "The ventilating currents shall be conducted and circulated to and along the face of each and every working place throughout the entire mine, in sufficient quantities to dilute, render harmless and sweep away smoke and noxious or dangerous gases, to such an extent that all working places and traveling roads shall be in a safe and fit state to work and travel therein." The requirement of air reports would seem to be of the utmost importance in assuring that the mine is a safe place to work with sufficient air and the absence of accumulations of dangerous gases which might cause an explosion. The Legislature has with clarity indicated and set the standard of this safety measure, the violation of which is likely to result in a dangerous accident.

Finally, defendants complain of a number of rulings by the trial judge on evidence. It is argued that the trial judge allowed a witness to convey a false impression as to the proximity of certain old workings to the defendants' mine upon a blackboard used at the trial. For the benefit of court and jury, the Commonwealth had the mine inspector portray the workings of defendants' mine upon a blackboard. In a later portion of the Commonwealth's case another witness drew in the location of the old Oakill

workings but on a different scale because of a lack of space on the blackboard. Defendants contend this gave the erroneous impression that the old workings were closer to defendants' mine than they really were. When the objection was made, the trial judge directed that the proper distance be shown by an arrow. We cannot see how there was any prejudice as a result. The distance was shown on the drawing and the difference in scale noted. The distance was actually the only relevant matter.

The Commonwealth called as one of its witnesses George Horzusky who had operated previously one of the old workings near the place where defendants' mine was located. At the time Horzusky mined his slopes, defendants' mine was not in existence. The purpose for which this testimony was offered was to establish the existence of the old working. The Commonwealth proposed that other evidence then would show that defendants knew of its existence. This witness, however, was not offered to prove knowledge on the part of defendants. No questions relating to knowledge were asked of this witness by the Commonwealth. On cross-examination, however, defendants attempted to elicit from the witness whether he had told defendants of the existence of his working. The Commonwealth objected to the questions as being beyond the scope of direct examination, and the objections were therefore properly sustained. Moreover, it was not error to refuse to allow cross-examination on the distance from defendants' mine to Horzusky's mine as the witness testified that defendants' mine was not in existence at the time of his operation, that he had no knowledge of the distance, and that he did not know where defendants' mine was located.

The trial judge also sustained the Commonwealth's objection to cross-examination of the witness Michael Sukeena relative to drilling ahead in another portion of the mine. The witness stated on direct examination that he worked only on the east side of the mine, that he never

received instructions to drill ahead, and that he did not drill ahead looking for old workings. On cross-examination defense counsel asked him again whether he had ever done any drilling ahead for the purpose of locating old workings, and the witness answered "No"; no objection was made by the Commonwealth to the question or answer. Defense counsel then asked the witness whether he had done any drilling in the east side of the mine, the only side in which the witness worked, and an objection was made and sustained. As we view it, the question was cumulative although worded differently from the previous question. We find no prejudice under the circumstances. The scope of cross-examination is largely within the sound discretion of the trial judge, and even if a ruling is erroneous the error is not ground for reversal unless it results in an apparent injury. Com. v. Fine, 166 Pa. Superior Ct. 109, 115, 116, 70 A. 2d 677. Defendants' contention that the refusal to allow the cross-examination gave the erroneous impression that defendants had never done any drilling ahead is not persuasive in view of the fact that other testimony was permitted which showed that they had done some drilling ahead on occasion.

The other rulings of the trial judge on matters of cross-examination are not properly before us. Defendants complain of the refusal to allow certain questions asked of the witness Harvey Hilbert on two occasions, the witness Edward Mullock, and the witness George Oakill. Defendants, however, did not take exceptions to the rulings on these matters. This case was tried prior to the Act of July 20, 1953, P. L. 552, 12 PS § 1196. Com. v. Guida, 298 Pa. 379, 376, 148 A. 501. We have examined the record and find the complaints relate to matters of insufficient consequence to prejudice defendants or affect the fairness of the trial.

In the course of the direct testimony of the defendant Martin, he was asked whether he had knowledge of any lease between the owner of the land and the corporate

defendant. The question asked was: "Is there, Mr. Martin, if you know, any arrangement between Indianhead Coal Company and Cano and Martin, Incorporated, concerning the development of this property?" The purpose was in furtherance of the defense that the corporation, not the individuals, was the operator and hence the technical violator of the Law. This question and the subsequent questions were improper as they were phrased in the present tense and were not designed to elicit whether there had been any such lease at the time of the alleged violations. In answer to the question the witness might say that there is such an arrangement, referring to the time of trial, and give the impression that there was such an arrangement at the time of the violations. Such defense was adequately presented by other testimony. Defendant Cano was permitted to testify concerning the oral lease arrangements at the time of the violations, and the trial judge in his charge instructed the jury that this was one of the defenses raised.

The last complaint of defendants is that the trial judge erred in refusing to allow defendants to testify as to their plans to close certain cross-cuts permanently, and as to whether or not telephones were at the mine for installation. There is no merit to this argument as the fifth and sixth counts, to which defendants' argument is directed, contain charges upon which defendants were acquitted. See Com. v. Haun, supra, 27 Pa. Superior Ct. 33, 38.

We have thoroughly reviewed the record, and we have given detailed consideration to all the issues raised by defendants in these appeals. We conclude that there is no error which would warrant further delay or a reversal of the convictions and sentences imposed on defendants. Defendants received a lengthy and fair trial on the charges which were made on August 1, 1952.

Judgments of sentence are affirmed, and the record is remitted to the court below, and it is ordered that defendants appear in the court below at such time as they may

there be called, and that they be by that court committed until they have complied with the sentences, or any parts thereof which have not been performed at the time each appeal was made a supersedeas.

ORDER OF THE SUPREME COURT OF PENNSYLVANIA ON PETITION FOR ALLOWANCE OF APPEAL FROM THE SUPERIOR COURT.

Now, March 27, 1957

Appeal Allowed.

PER CURIAM.

ORDER OF THE SUPREME COURT OF PENNSYLVANIA ON APPELLANTS' SUBSEQUENT PETITION AND MOTION FOR CONTINUANCE.

May, 17, 1957. The within motion for continuance is refused; it is unnecessary for appellants to print an extensive record; *argument on the appeal will be limited to the question whether the provision for the initiation of prosecution by information, under Section 1, Article XVII of the Anthracite Mine Law of June 2, 1891, P. L. 176, as amended, violates Article I, Section 10, of the Pennsylvania Constitution.* (Italics added.)

PER CURIAM.

IN THE

SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

Nos. 26 & 27 January Term, 1958

Appeal from Conviction and Sentence by Court of Quarter Sessions of Schuylkill County, No. 553, September Sessions, 1953; and from the Judgment of the Superior Court of Pennsylvania.

COMMONWEALTH OF PENNSYLVANIA

v.

AURELIO CANO, CHARLES MARTIN, AND CANO & MARTIN, INC.

Appeals of Aurelio Cano and Charles Martin

OPINION OF THE COURT.

(Filed June 28, 1957)

PER CURIAM:

Aurelio Cano and Charles Martin, defendants, were convicted by a jury and sentenced in the Court of Quarter Sessions of Schuylkill County for violation of the Anthracite Mine Law, Act of June 2, 1891, P. L. 176, as amended, 52 PS § 71 et seq. The defendants were arrested on a warrant issued by President Judge Palmer of Schuylkill County on August 1, 1952, as a result of an affidavit filed by an anthracite mine inspector pursuant to Article XVII, § 1 of the statute, 52 PS § 511, charging them with being negligently guilty of thirteen violations of the statute. There

was no presentment to or indictment by the grand jury as the procedure in the statute provided otherwise. The prosecution arose out of an occurrence in defendants' mine on March 27, 1952, in which five miners lost their lives when the mine was flooded from adjacent workings. Defendants were not charged in these proceedings with any crime directly related to the deaths.

Following the dismissal of the defendants' motion to dismiss the proceeding as unconstitutional, a jury trial was demanded under the provisions of the statute, Article XVII, § 1, 52 PS § 511, supra. At the trial a demurrer was sustained as to the corporate defendant, Cano & Martin, Inc. The ninth count in the information was dismissed at the request of the Commonwealth. The twelve remaining counts or charges against defendants were submitted to the jury and resulted in their acquittal on seven counts and conviction on five counts. Motions in arrest of judgment and for a new trial were filed. The court en banc refused the motion for a new trial as to all counts in the information, but granted the motion in arrest of judgment on the first count. On each of the four counts remaining (second, seventh, tenth and twelfth) defendants were sentenced to the maximum penalty of a $500 fine and three months in the county prison, 52 PS § 511, or a total fine of $2,000 and one year in the county prison. Defendants appealed to the Superior Court which unanimously upheld the convictions and affirmed the judgments and sentences: *Commonwealth v. Cano & Martin, Inc.*, 182 Pa. Superior Ct. 524, 128 A. 2d 358. We allowed an appeal to this Court, limited, however, to the constitutional question raised by defendants under Article I, Section 10 of the Pennsylvania Constitution.

After due consideration we are in accord with the determination of the question by the Superior Court, and find nothing that can be profitably added to the learned and able discussion of the matter by President Judge Rhodes. The determination of the Superior Court is affirmed on the following portion of his opinion:

"Defendants contend that the procedure which was followed—the filing of an affidavit charging them with violations of the Anthracite Mine Law, and the issuance of a warrant by the judge of the Court of Quarter Sessions of Schuylkill County, in accordance with Article XVII, § 1, of the Law, 52 PS § 511—violates Article I, § 10 of the Constitution of this Commonwealth, PS Const. Art. I, § 10, which provides: 'No person shall, for any indictable offense, be proceeded against criminally by information, ...' It is contended that the absence of a bill of indictment by the grand jury renders the statutory procedure invalid. The procedure by information in the sense that it is used in the Pennsylvania Constitution refers exclusively to practices formerly used in England whereby, upon information in the King's Court by some person, the accused was put on trial without further inquiry or investigation. Com. ex rel. Stanton v. Francies, 250 Pa. 496, 500, 501, 95 A. 527; Com. ex rel. Wheeler v. Francies, 58 Pa. Superior Ct. 266, 267; Com. ex rel. Scasserra v. Marorey, 179 Pa. Superior Ct. 150, 153, 115 A. 2d 912. The absence of an intervening indictment by the grand jury would render this procedure unconstitutional if the offenses for which these defendants were tried are 'indictable offenses' within the meaning of the Constitution. Com. v. Wadley, 169 Pa. Superior Ct. 490, 493, 83 A. 2d 417. The legislature cannot abolish the grand jury or remove this method of criminal procedure for 'indictable offenses.' Com. v. Liebowitz, 143 Pa. Superior Ct. 75, 80 17 A. 2d 719; Dauphin County Grand Jury Investigation Proceedings (No. 2), 332 Pa. 342, 353, 354, 357, 2 A. 2d 802. See, also, Hartranft's Appeal, 85 Pa. 433, 453, where, in a dissenting opinion, Chief Justice Agnew stated that the grand jury is 'one of the boasted bulwarks of English liberty handed down to us, and protected by the Declaration of Rights.'

"At common law the method of proceeding by information was not offensive generally, and an indictment by a grand jury was required only in cases involving capital

crimes and felonies. 'By the law of England, informations by the Attorney-General, without the intervention of a grand jury, were not allowed for capital crimes, nor for any felony, by which was understood any offense which at common law occasioned a total forfeiture of the offender's lands, or goods, or both. 4 Bl. Com. 94, 95, 310. The question whether the prosecution must be by indictment, or might be by information, thus depended upon the consequences to the convict himself.' Ex parte Wilson, 114 U. S. 417, 423, 5 S. Ct., 935, 29 L. Ed. 89, 91. See 42 C. J. S. Indictments and Informations, § 9, p. 837. It seems that, when this common law safeguard was recognized in the United States, it apparently assumed a greater area of protection. See 42 C. J. S., Indictments and Informations, §9 (b), p. 838. The Pennsylvania Constitution and the constitutions of a number of states provide that proceedings by information are prohibited when the offense is an 'indictable' offense. The Fifth Amendment to the Constitution of the United States provides: 'No person shall be hel l to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . .' Although the language used in the Constitution of the United States and in the constitutions of various states, including Pennsylvania, could be interpreted as limiting their application to capital crimes and felonies as at common law they have not been so restricted. These provisions have been given a more extensive application, and the test generally applied in determining whether an indictment is necessary relates to the extent of the punishment which may be imposed. It has been held in Kentucky, under a constitutional provision virtually the same as in Pennsylvania, that the term 'indictable offense' refers to common law and statutory offenses, the punishments for which are 'infamous,' such as death or imprisonment in a penitentiary as distinguished from imprisonment in a county jail. Perry v. Bingham, 265 Ky. 133, 95 S. W. 2d 1099, 1100, 1101; Lakes v. Goodloe, 195 Ky. 240, 242 S. W. 632, 639, 640. This

is similar to the test under the Federal Constitution which is whether the accused is made subject to punishment by imprisonment in a penitentiary or at hard labor. See Brede v Powers, 265 U. S. 4, 44 S. C. 8, 68 L. Ed. 132; Mackin v. United States, 117 U. S. 348, 350, 351, 6 S. Ct. 777, 29 L. Ed 909, 910, 911; Ex parte Wilson, supra, 114 U. S. 417, 423, 5 S. Ct.. 935, 29 L. Ed. 89, 91. A statutory crime which is punishable by imprisonment at hard labor or by a fine is considered infamous because imprisonment may be imposed. United States vs. Moreland, 258 U. S. 433, 42 S. Ct. 368, 66 L. Ed. 700. It will be observed that the controlling consideration under the federal rule is imprisonment in a penitentiary or at hard labor.

"Our decisions indicate that the provision of Article I, § 10, of the Pennsylvania Constitution was not intended to be limited to capital offenses and felonies, but that it applies also to the more serious indictable common law misdemeanors and statutory misdemeanors which the Legislature intends should be indictable. Mansfield's Case, 22 Pa. Superior Ct. 224, 234; Mountain v. Com., 68 Pa. Superior Ct. 100, 102; Allen v. Com., 77 Pa. Superior Ct. 244, 246, 247; Com. ex rel. City of Pittsburgh v. Heiman, 127 Pa. Superior Ct. 1, 9, 10, 190 A. 479; Com. ex rel. Marsh v. Lindsey, 130 Pa. Superior Ct. 448, 450, 451, 198 A. 512.

"Defendants argue that the offenses charged under the Anthracite Mine Law were offenses which could have been punished at common law under the rule of Com. v. McHale, 97 Pa. 397, 408. In the latter case the Supreme Court said that the test for determining which offenses are indictable in Pennsylvania as common law offenses is not whether the precise definition of the crime can be found in the English texts or reported cases, but rather whether the offenses presently charged might have been punished at common law. It is there stated (page 408 of 97 Pa.): 'What is a common law offense? The highest authority upon this point is Blackstone. In chap. 13 of

vol. 4, of Sharswood's edition, it is thus defined. "The last species of offenses which especially affect the Commonwealth are those against the public [peace] or economy. By the public [peace] and economy I mean the due regulation and domestic order of the kingdom, whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood and good manners, and to be decent, industrious and inoffensive in their respective stations. This head of offences must therefore be very miscellaneous, as it *comprises all such crimes as especially affect public society;* and are not comprehended under any of the four preceding series. These amount some of them to felony, and others to misdemeanors only".' The Supreme Court then held that the making of false and fraudulent entries in a book of voters, the depositing of false fraudulent ballots, and the false and fraudulent counting of ballots at an election were indictable as common law offenses under this rule. There have been other instances in which conduct was indictable as a common law offense in the absence of specific common law precedent or statutory declaration. In the McHale and subsequent cases, the inquiry whether the conduct amounted to a common law offense under this miscellaneous category was for the purpose of determining whether the Commonwealth was empowered to prosecute the accused for such conduct. See The Penal Code, June 24, 1939, P. L. 872, § 1101, 18 PS § 5101. Here the inquiry is whether a statutory offense is 'indictable' within the meaning of the constitutional provision. An offense may come within the McHale rule of common law offenses and still not be indictable, as not all offenses were indictable at common law. Ex parte Wilson, *supra*, 114 U. S. 417, 423, 5 S. Ct. 935, 29 L. Ed. 89, 91. Summary proceedings were also recognized at common law; and, while some petty offenses might conceivably fall within the broad

miscellaneous category of the McHale rule, they may nevertheless be properly prosecuted without an indictment. See Com. ex rel. City of Pittsburgh v. Heiman, *supra*, 127 Pa. Superior Ct. 1, 7, 10, 190 A. 479. If there is no specific common law or statutory procedure established for an offense which comes within the McHale rule, the Commonwealth is permitted to proceed in the usual manner, that is, by indictment. It is one thing to say that an indictment may lie in the absence of a specific common law or statutory procedure and another thing to say that the Constitution requires such an indictment. See 42 C. J. S., Indictments and Informations, §§ 8, 9, p. 837; 1 Wharton's Criminal Law, 12th Ed., § 30, p. 47; Com. ex rel. Barr v. Naylor, 34 Pa. 86, 89.

"Moreover, we do not agree with defendants' contention that the charges against them, in the absence of the statute, would have been indictable as common law offenses. Defendants were charged and tried under Article XVII, § 1 of the Law, 52 PS § 511, for having been 'negligently guilty of an offense against the provisions of this act, whereby a dangerous accident had resulted or might have resulted to any person or persons employed in such mine . . .' The four alleged violations, of which they were convicted and for which they were sentenced, relate to the following: (1) Failure to take the precautions prescribed by Rule 15 of Article XII of the Law, as amended, 52 PS § 286, when approaching inaccessible workings which were likely to contain water or gas (second count); (2) failure to provide an efficient brake on every drum for lowering or raising persons or materials in the mine, as required by Article IV, § 14 of the Law, 52 PS § 356 (seventh count); (3) failure to send reports of air measurements in the mine to the mine inspector, as required by Article X, § 16 of the Law, 52 PS § 564 (tenth count); and (4) improper and unsafe storage of explosives used in the mine contrary to Rule 26 of Article XII of the Law, 52

PS §421 (twelfth count). We think it is obvious that these offenses are not within the McHale definition of common law offenses. Except as such conduct has been prohibited by this statute, they do not offend against the public peace, morals, or economy, or the due regulation and domestic order of the Commonwealth. Although the Legislature, under the valid exercise of its police power, did regulate the business of mining by this statute for the safety of miners, it is only by virtue of the statute that the failure to act in accordance therewith is made a punishable offense. The conduct of defendants was not necessarily offensive in itself, and in our judgment it would not have been so at common law. The conduct regulated by the statute is not similar to that in the McHale or subsequent cases. In Com. v. McHale, *supra*, 97 Pa. 397, there was fraud, in Com. v. Mochan, 177 Pa. Superior Ct. 454, 110 A. 2d 788, and Com. v. DeGrange, 97 Pa. Superior Ct. 181, there were lewd, immoral, and indecent acts, and in Com. v. Flaherty, 25 Pa. Superior Ct. 490, there was an attempt to commit larceny which is a crime. If the contention of defendants is correct and the McHale rule is given such a broad interpretation, it would follow that nearly every newly created statutory offense would have to be considered a common law offense. As we view it this is not the scope of the McHale rule. It is applicable only to such conduct which is inherently offensive to the public peace, morals, and economy, and not to that which is within the power of the Legislature to prescribe as new crimes. See I Wharton's Criminal Law, 12th Ed., § 28, p. 43; 22 C. J. S., Criminal Law, § 8, p. 58. The Legislature has the power to prescribe new offenses and provide penalties therefor, and it may set forth the procedure by which a person charged with the commission thereof may be tried and his guilt or innocence determined. It may do this without the new statutory offense necessarily taking on the attributes of a common law offense

and becoming thereby indictable within the meaning of the constitutional provision. Van Swartow v. Com., 24 Pa. 131, 133, 134; Allen v. Com., 77 Pa. Superior Ct. 244, 247. Cf. Com. ex rel. City of Pittsburgh v. Heiman, *supra*, 127 Pa. Superior Ct. 1, 6-10, 190 A. 479. As we have said, summary proceedings were recognized at common law, and the Legislature may provide this means of prosecution when it considers the offense created of a petty nature or of lesser gravity than an indictable offense. See Duke v. United States, 301 U. S. 492, 495, 57 S. Ct. 8[illegible], 81 L. Ed. 1243, 1245. The error in defendants' contention is not only in giving a broad interpretation to the McHale rule and making it applicable to almost every newly created offense which may be connected in some way with the public peace, morals, or economy, but also in extending the rule so that every offense which may be said to fit that broad definition is of necessity an indictable offense.

"The fact that the Legislature declared the violations with which defendants are charged to be misdemeanors (52 PS §514) does not make them indictable offenses. The Legislature indicated its intention in this respect by providing a special procedure for prosecution of these offenses. It is true that the general and customary meaning of the word misdemeanor is an indictable offense not amounting to a felony (Com. ex rel. Marsh v. Lindsey, *supra*, 130 Pa. Superior Ct. 448, 450, 198 A. 512), but the use of the term misdemeanor may also include offenses not punishable by indictment. 'But if it be true that the word [misdemeanor] includes all indictable offenses below the grade of felony, it does not follow it may not with propriety be used by the legislature to designate a class of petty offenses not known to the common law, and not necessarily indictable.' Allen v. Com., *supra*, 77 Pa. Superior Ct. 244, 248. See, also, Com. v. Mecca Cooperative Co., 60 Pa. Superior Ct. 314, 317, where a summary offense was likewise designated by the Legislature as a misdemeanor.

The Legislature here, as in the Allen and Mecca cases, although designating the offenses involved misdemeanors, clearly indicated that they were not of sufficient severity to be indictable; the punishment is by fine or simple imprisonment in the county prison for three months or both. In other sections of the Law (i. e., Article I, § 1, as amended, 52 PS § 71), the Legislature provided summary conviction as the method of enforcement, although the summary offenses are included in the declaration that all offenses under the Law are misdemeanors (52 PS § 514). With respect to violations punishable under Article XVII, § 1, 52 PS § 511, presently before us, the Legislature indicated that, when the violation involved negligence and was likely to cause a dangerous accident, the punishment should be greater and the prosecution should be conducted in conformity therewith. It thus provided for a trial in the court of quarter sessions and before a jury if the defendants so desire. These statutory offenses were within the power of the Legislature to create. They were not crimes at common law. They are more serious than summary offenses, although they are not of the magnitude of indictable misdemeanors. See Duke v. United States, *supra*, 301 U. S. 492, 495, 57 S. Ct. 835, 81 L. Ed. 1243, 1245; United States v. Sloan, 31 F. Supp. 327; United States v. Lomas, 60 F. Supp. 198; Falconi v. United States, 6 Cir., 280 F. 766; Kempe v. United States, 8 Cir., 151 F. 2d 680."

The judgments of the Superior Court affirming the judgments and sentences of the Quarter Sessions of Schuylkill County, are affirmed.

ORDER OF THE SUPREME COURT OF PENNSYLVANIA ON APPELLANTS' PETITION FOR RECONSIDERATION OF ALLOCATUR AND FOR REARGUMENT.

September 5, 1957.

Petition denied.

Per Curiam.

Mr. Justice Musmanno Dissents.

APPENDIX B.

52 Purd. Stat. Ann.

§ 511. Proceedings on Complaint of citizen

Any judge of the court of quarter sessions of the peace of the county in which the mine or colliery, at which the offense, act or omission as hereinafter stated has occurred, is situated, is hereby authorized and required, upon the presentation to him of the affidavit of any citizen of the commonwealth setting forth that the owner, operator or superintendent, or any other person employed in or about such mine or colliery, had been negligently guilty of an offense against the provisions of this act, whereby a dangerous accident had resulted or might have resulted to any person or persons employed in such mine or colliery, to issue a warrant to the sheriff of said county, directing him to cause such person or persons to be arrested and brought before said judge, who shall hear and determine the guilt or innocence of the person or persons so charged; and, if convicted, he or they shall be sentenced to pay a fine not exceeding five hundred dollars, in all cases not otherwise provided for in this act, or an imprisonment in the county jail for a period not exceeding three (3) months, or both, at the discretion of the court: Provided, That any defendant may waive a trial before a judge as herein provided, and at any time, at or before the time of such trial, demand a trial by jury in the court of quarter sessions, in which case he may enter into a recognizance before such judge with such surety or sureties and in such sum as said judge may approve, conditioned for his appearance at the next court of quarter sessions to answer the charge against him and abide the orders of the court in the premises, meanwhile to be of good behavior and keep the peace, or in default of such recognizance to be committed to the county jail to await such trial. 1891, June 2, P. L. 176, art. XVII, § 1.

52 Purd. Stat. Ann.

§ 286. Accumulation of water

Whenever a place is approaching inaccessible workings, which are likely to contain a dangerous accumulation of water or gas, the operator shall establish and clearly show on the map furnished the mine foreman a stopping distance not less than one hundred (100) feet from the said inaccessible workings and such stopping point shall not be passed until after the coal company officials, the mining engineer and the mine inspector have agreed on the width of any such approaching place or places and the point or distance at which test holes shall be started. The said test holes shall not be less than twenty (20) feet in advance of the working face. There shall be one such test hole at or near the center of the working face and sufficient flank holes on each side of said place. No such stopping distance shall be less than one hundred (100) feet from the said inaccessible abandoned workings, nor need it be greater than the distance calculated in accordance with the rule commonly used in the establishing of barrier pillars, namely one per centum (1%) of the depth below drainage times the thickness of the coal seam plus thickness of seam times five (5), excepting in such cases where calculatio in accordance with said rule establishes a stopping distance of less than one hundred (100) feet. This act does not permit the driving of gangways, chambers or other excavations into barriers which are subjected to their maximum water pressure, as calculated in accordance with the rule here established, unless the said water-head is reduced by pumping or other means.

"The term 'mining engineer' as used in this act shall mean the person who shall, in behalf of the operator, have charge or general supervision of the work of compiling the mine map. 1891, Jun 2, P. L. 176, art. XII, rule 15; 1947, June 28, P. L. 1094, § 1.

52 *Purd. Stat. Ann.*

§ 356. Drums to have efficient brakes

An efficient brake shall be attached to every drum that is used for lowering or raising persons or material in any mine. 1891, June 2, P. L. 176, art. IV, § 14.

52 *Purd. Stat. Ann.*

§ 564. Monthly reports to be sent to inspector

A report of these air measurements shall be sent to the inspector before the twelfth day of each month, for the preceding month together with a statement of the number of persons employed in each district. 1891, June 2, P. L. 176, art. XII, § 16.

52 *Purd. Stat. Ann.*

§ 421. Restrictions on storage of explosives, or amount permitted at one time and place

Gunpowder or any other explosive shall not be stored in a mine, and a workman shall not have at any one time, in any one place, more than one keg or box containing twenty-five (25) pounds, unless more is necessary for a person to accomplish one day's work. 1891, June 2, P. L. 176, art. XII, rule 26.